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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1047

AMERICAN RADIATOR & STANDARD SANITARY CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 1048

BORG-WARNER CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1049

NORMAN R. HELD, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1050

KOHLER CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-72a [1]) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1970, and petitions for rehearing were denied on November 3, 1970. The petitions for writs of certiorari were filed on December 3, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in affirming jury verdicts convicting petitioners of participation in an antitrust price-fixing conspiracy, the court of appeals applied the proper standard of appellate review.

2. Whether petitioners' right of confrontation under the Sixth Amendment was violated by application of the federal co-conspirator exception, and other well-recognized exceptions, to the hearsay rule.

3. Whether the court of appeals correctly held that cross-examination of petitioner Heid concerning the

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[1] The court's opinion appears identically at pages 1a-72a in the appendices of the petitions in Nos. 1048, 1049, 1050. It also appears at Pet. App. No. 1047, 7a-78a. For convenience, the United States will use the text of the opinion set forth in Nos. 1048, 1049 and 1050 and refer to this simply as "Pet. App."

As used herein "J.A." refers to the four-volume Joint Appendix to the main briefs in the court of appeals. "E" refers to the three-volume "Exhibits to Joint Appendix"; "T" refers to the trial transcript.

1954 strike against Kohler Company did not constitute prejudicial error as to Held and Kohler, when considered in the context of the entire trial, and the strength of the government's case.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment of the Constitution provides:

> * * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law; * * *

The Sixth Amendment to the Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him; * * *.

Section 1 of the Sherman Act, 15 U.S.C. 1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States * * * is declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1–7 of the title to be illegal shall be deemed guilty of a misdemeanor * * *.

STATEMENT

On October 6, 1966, a grand jury returned a single count indictment charging eight corporations, eight high-ranking employees of those corporations and a trade association with conspiring to fix the prices of enameled cast iron and vitreous china plumbing fixtures, in violation of Section 1 of the Sherman Act

(Pet. App. 2a–3a).[2] The indictment stated that at meetings held in several cities the defendants agreed to raise prices on enameled cast iron and vitreous china plumbing fixtures, to limit the maximum allowable discounts on those fixtures, and to discontinue the production of regular enameled cast iron fixtures, leaving production only of higher-priced acid resistant fixtures; and that the defendants had carried out their agreement (Pet. App. 2a–4a).

Eleven of the seventeen defendants pleaded *nolo contendere* and were sentenced on their pleas (Pet. App. 5a). The petitioners chose to stand trial. After a sixteen-week jury trial, all six petitioners were convicted (Pet. App. 5a–6a). The court of appeals affirmed (Pet. App. 66a).[3]

The conspiracy consisted of four phases, interrelated as to timing and participants, yet possessing sufficient distinctiveness to merit separate discussion.

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[2] The defendants other than the petitioners were Crane Company and its vice-president, Robert Casner; Universal-Rundle Corp. and its vice-president, Stanley Backner; Rheem Manufacturing Co. and its vice-president, Robert Pierson; Wallace-Murray Corp. and its president, John Balmer; Briggs Manufacturing Company; George Kelch, President of petitioner Borg-Warner's Ingersoll-Humphryes Division; and the Plumbing Fixtures Manufacturers Association (PFMA) (Pet. App. 2a–3a).

[3] The affirmance was unanimous as to petitioners American Standard, Borg-Warner, Decker, and Quinn. Judge Aldisert dissented from the affirmance of the convictions of Kohler Company and Held. All the affirmances were as to all aspects of the conspiracy except for petitioner Decker; as to him, the court of appeals affirmed on a finding of sufficient evidence regarding the conspiracy to eliminate regular enameled fixtures, and did not decide the sufficiency question regarding other aspects of the conspiracy.

A. THE AGREEMENT TO INCREASE BATHTUB PRICES

In October and November, 1962, the seven defendant corporations producing enameled cast iron plumbing fixtures all published identical, increased prices on high volume enameled cast iron bathtubs (Pet. App. 8a).[4] This uniform price increase was the direct result of an agreement reached by the sales officials of the corporations in a meeting held on September 17, 1962, at petitioner Quinn's room at the Sheraton-Chicago Hotel (Pet. App. 8a). Petitioners Quinn and Held were there, as was defendant Kelch of Borg-Warner; high-ranking officials of Crane, Universal-Rundle, Rheem and Wallace-Murray also participated (Pet. App. 8a–9a). As the court of appeals noted, "[t]here was substantial 'eyewitness' testimony concerning price discussions and agreements at this gathering" (Pet. App. 9a).

For example, Mr. Callanan, who had participated in the meeting for Rheem, testified not only that there had been a discussion of specific bathtub prices, but also that there had been agreement as to what the new prices would be.[5] Similarly, Mr. Cannon of Wallace-

[4] All seven corporations published new special prices, which quoted prices applicable to purchases of high-volume staple items in accord with certain specified conditions. The bathtubs involved in this phase of the conspiracy were such items. (Pet. App. 8a).

[5] "Q. The question, Mr. Callanan, was: What was decided with respect to the specific increased prices on bathtubs in that room?

"The COURT: If anything.

"THE WITNESS: The prices as reflected in my bulletin of November 2, 1962 [which were identical to the prices of all the other manufacturers], were the prices that I came out of that room with that understanding." (Pet. App. 9a).

Murray reported to his superior of the Sheraton-Chicago agreement that there had been a discussion of prices and "* * * that there was a tentative agreement to increase prices * * *." (Pet. App. 10a).

B. THE AGREEMENT TO MAINTAIN AND INCREASE THE PRICES OF VITREOUS CHINA PLUMBING FIXTURES

The conspirators who met in petitioner Quinn's hotel room on September 17, 1962, were not only concerned with raising bathtub prices; they also wanted to put into effect a general increase in the prices of vitreous china fixtures. They agreed that higher prices were a necessity, but they feared that an increase at that time would not hold if the "short-line" manufacturers[4] kept their prices at current levels (Pet. App. 11a–12a). However, on November 20, 1962, petitioners Quinn and Held, along with Kelch of Borg-Warner and high-ranking officials of Crane and Rheem, met at the Shoreham Hotel in Washington (Pet. App. 12a). Rheem's vice-president, Pierson, testified that Casner of Crane announced that Crane would soon raise prices to a specific level. Discussion of these prices followed and, according to Pierson, "It was my opinion when I left that people probably would follow the lead of Crane in some form or another" (Pet. App. 13a).

Crane did announce a 7 percent across-the-board in-

[4] In the trade, a "short-line" manufacturer is one that produces only the most commonly used vitreous china fixtures. Petitioners American Standard, Kohler and Borg-Warner (and all the other indicted corporations except Briggs) were "full-line" companies.

crease on all china fixtures on January 14, 1963. Shortly thereafter all the indicted corporations except Borg-Warner raised their prices to the level of Crane's (Pet. App. 13a).[1] The conspirators, fearing that this increase would not hold firm, met at the Waldorf-Astoria Hotel in New York on February 7, 1963, "* * * to try to maintain the new prices" (Pet. App. 13a). Petitioners Decker, Quinn, and Held were present, as were Kelch of Borg-Warner and several other high-ranking sales officials (Pet. App. 13a–14a). Bonnett of Wallace-Murray testified that the men discussed new china prices and that petitioner Quinn stated that "* * * the general consensus was that the new prices would—we would try to maintain the new prices" (Pet. App. 14a). Five days later, Borg-Warner raised its prices to conform with those of the other conspirators.

C. THE AGREEMENT TO LIMIT MAXIMUM DISCOUNTS FROM WHOLESALER NET PRICES

The conspirators further agreed that they each would limit the discounts from wholesaler net prices to a maximum of 15 percent for enameled cast iron and 20 percent for vitreous china fixtures (Pet. App. 15a). Once again, agreement was reached at the September 17, 1962, meeting at Quinn's Chicago-Sheraton

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[1] Briggs had had no representative at the Shoreham Hotel meeting, but it increased its prices only after its vice-president, Betz, had discussed the price increase with Crane officials and agreed to raise its prices to the agreed levels. (Pet. App. 13a).

hotel room. Once again, the proof of agreement came from eyewitness testimony. Callanan of Rheem testified that he came away from the meeting "of the opinion that other people would be using the same structure" (Pet. App. 16a). The "other people" were the "other members who were in the room that evening," and the "structure" was "[f]ifteen per cent on iron and twenty per cent on china" (Pet. App. 16a). Cannon of Wallace-Murray confirmed these percentages in his testimony; he noted that in the discussion he had agreed to verify actual prices quoted from his competitors, in order to prevent building contractors from playing off one manufacturer against another and getting a better discount than the 15 percent and 20 percent allowed (J.A. 27a; 292a–294a). When the conspirators met on February 7, 1963, at the Waldorf-Astoria Hotel, they reaffirmed their earlier agreement to limit discounts. Bonnett of Wallace-Murray testified that petitioner Quinn reported to him that there had been a discussion of discounts and a "tentative discussion or agreement" to limit the discounts to 15 percent on cast iron and 20 percent on vitreous china (Pet. App. 16a–17a). Bonnett assured Quinn that his company "would try to adhere to those discounts" (Pet. App. 17a).[8]

[8] Bonnett, upon returning to Pittsburgh, instructed his subordinate Cannon not to discount from wholesaler net prices more than those percentages on those products (J.A. 305a–306a).

D. THE AGREEMENT TO ELIMINATE REGULAR ENAMELED CAST IRON PLUMBING FIXTURES AND TO INCREASE THE PRICES OF ACID RESISTANT FIXTURES

Another aspect of the conspiracy was the agreement to stop production of regular enameled cast iron fixtures and impose an increased price structure on the acid resistant fixtures which would remain in production. Regular enameled cast iron fixtures were important to the conspirators' business. They accounted, for example, for more than $20,000,000 in gross annual sales at American Standard (Pet. App. 17a). Competition from steel and plastic fixtures, both of which are acid-resistant, was intense (Pet. App. 17a). In order to implement an industry decision to discontinue so fundamental a line of fixtures, however, strong protective cover was needed (JA 507a, 479a–482a). The device selected was to change the Enameled Cast Iron Plumbing Fixtures Commercial Standard by having it provide for acid-resistant finish only, and then cite the revision to justify discontinuation of regular enamel. Publication of the revised standard would also serve as the signal for the defendants' scheme to become operational (JA 470a–472a, 403a, 405a, 418a; 394a–395a).*

The conspirators agreed upon the elimination of regular cast iron and the new prices for acid resistant cast iron at a meeting on March 28, 1963, in Quinn's

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*The Commercial Standard is a recorded voluntary standard of the trade published by the U.S. Department of Commerce (E 158). Since the standard is purely voluntary, it could not require the conspirators to discontinue the use of regular enameled cast iron fixtures.

room at the Palm Beach Biltmore Hotel (Pet. App. 18a)." Pierson of Rheem testified that petitioners Quinn, Decker and Held were present, as were Kelch of Borg-Warner and several other key officials of other corporations (Pet. App. 18a). Pierson testified most explicitly of this meeting:

> A. The discussion resolved [sic] around the specific timetable that would occur in this change from—in the elimination of regular enamel and the pricing schedule that would resolve as a result of this change.
>
> Q. Were specific prices mentioned during the course of this meeting?
>
> A. Yes.
>
> * * * * *
>
> Q. What was decided at this meeting, if anything, Mr. Pierson?
>
> A. Well, as I said originally, there was a timetable established *and a new pricing structure, which I felt was agreed by all those present.* [Pet. App. 18a–19a; emphasis added by court of appeals.]

As the court of appeals found, Cannon of Wallace-Murray confirmed Pierson, testifying that the participants had discussed the "proper philosophy" of pricing in the new all acid-resistant market and that they had decided upon certain prices (Pet. App.

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[10] The record shows that the conspirators had frequently discussed the need to eliminate regular enamel and to restructure the prices of acid-resistant enamel before: at the Sheraton-Chicago meeting in September, 1962 (JA 371a, 554a–555a, 477a–478a); at meetings at the Shoreham Hotel in November, 1962 (JA 435a–436a, 442a–444a, 458a–459a; E4); at the Americana Hotel in New York (JA 376a–377a).

19a). Callanan also confirmed the price discussion and the specificity of the prices selected (Pet. App. 19a). He also testified that "There was a general discussion that the timing of the thing would tie in with the issuance of Commercial Standards" (JA 368a–369a)."

In order to reaffirm their Palm Beach agreement, the conspirators met two months later at the Airport Hotel in Pittsburgh on May 15, 1963 (Pet. App. 20a). Decket, Quinn, and Held were present, as were Kelch of Borg-Warner and officials of Crane, Wallace-Murray, Rheem, and Universal-Rundle (Pet. App. 20a). Bonnett of Wallace-Murray testified that they discussed specific prices and that "It was my understanding when I left the meeting that the prices would generally be on this level" (Pet. App. 20a). The somewhat general nature of the discussion was due to the fact that this meeting was to reaffirm the decision taken earlier at Palm Beach. As Cannon of Wallace-Murray testified, at the time of the Pittsburgh meeting he already knew the price structure to be announced in July and August of that year (JA 403a).

The conspirators held a final, confirmatory meeting in Quinn's room at the Waldorf-Astoria Hotel on

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[11] The purported justification for removing non-acid-resistant enamel from the Commercial Standard was that it was no longer an industry-wide item. The PFMA Enameled Cast Iron Standards Committee so stated on February 7, 1963 (E328 ¶ 5). As the defendants themselves admitted at trial (JA 553a–554a, 556a, 478a, 516a, 391a–392a), this representation was untrue. In turn, the Commerce Department on June 7, 1963, issued a new, revised standard (effective July 10, 1963) that "for the first time made acid resistant cast iron enamel fixtures the industry standard" (Pet. App. 17a–18a).

June 26, 1963 (Pet. App. 20a). In the words of Pierson, who attended, there was "a general review of the proposed plan on this product line and the pricing that was related thereto" (Pet. App. 20a). A copy of the announcement that American Standard intended to issue concerning the changeover and the new prices was discussed by the group (Pet. App. 20a–21a). On July 1, 1963, American Standard made this announcement public: within two months all the other indicted cast iron manufacturers had announced their discontinuance of regular enameled cast iron fixtures and new, higher prices for acid resistant fixtures (Pet. App. 18a).

The court of appeals stated: "The government's evidence of price fixing by the appellants was compelling * * * the cumulative effect of the government's case was overwhelming" (Pet. App. 65a–66a). As the court noted, the government's case largely relied on the consistently incriminating eyewitness testimony of the petitioners' own co-conspirators (Pet. App. 66a), and showed an extensive and successful conspiracy to fix prices on enameled cast iron and vitreous china plumbing fixtures.

ARGUMENT

I. THE COURT OF APPEALS APPLIED THE APPROPRIATE STANDARD OF REVIEW

In many respects this is a typical antitrust criminal conspiracy case: there are several defendants, the trial consumed sixteen weeks, and the record of trial runs to more than 10,000 transcript pages and 900 exhibits.

In at least one respect, however, this case is decidedly atypical. Here, the government's proof rested not primarily on inferences to be drawn from circumstantial evidence of parallel business behavior but on direct testimony of witnesses who were themselves participants in illegal price discussions and agreements. The appropriate standard for appellate review in this type of case was long ago established by this Court: where the evidence against the defendants is strong, jury verdicts will not be reversed for errors unless the reviewing court is persuaded that misconduct of the trial prevented the jury from determining the case on a dispassionate consideration of the evidence. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239–240. See also *Glasser* v. *United States*, 315 U.S. 60, 83.

The court of appeals correctly applied this standard in discharging its difficult review function here. To be sure, it found and identified errors; total absence of error in a lengthy and hard-fought trial of this magnitude and complexity would be surprising indeed. But after a painstaking review of the entire record, and thorough consideration of all the many issues raised by petitioners here, the court concluded that:

> Whether the errors be viewed in isolation or cumulatively we are completely satisfied that they did not deprive appellants of a fair trial or operate to their substantial prejudice. On the contrary, we are satisfied from our examination of the record in its totality that the appellants received a fair trial and that their conviction

was entirely warranted from the evidence. [Pet. App. 66a]."

This conclusion was in full conformity with the court's duty under the federal harmless error statute.[11] It is true that the court spoke of the strength of the government's case; indeed the court found the government's proof "overwhelming" (Pet. App. 65a). But the court made plain that it had viewed "the record in its totality"; under the doctrine of harmless error an appraisal of the strength of the government's case is essential. Even error of constitutional scope—and there was no such error in this case—may be harmless in the face of overwhelming government proof. *Harrington* v. *California*, 395 U.S. 250, 254. *A fortiori*, overwhelming government proof may render ordinary error harmless.

We submit that petitioners had a full and fair trial, and that the claims they seek to present here were fully considered and correctly rejected by the court below under the appropriate standard of review.

II. THERE WAS NO VIOLATION OF THE PETITIONERS' SIXTH AMENDMENT RIGHT TO CONFRONTATION

A. Petitioners request this Court to declare the co-conspirator hearsay exception a denial of the right of

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[11] Except as to petitioners Kohler Co. and Held, and with reference to only a single issue to be discussed *infra*, this determination was unanimous.

[12] 28 U.S.C. 2111: "On the hearing of any appeal • • • the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

confrontation (Pet. No. 1047, 15–16). The co-conspirator exception to the hearsay rule has been part of federal law for well over a century. *United States* v. *Gooding*, 12 Wheat. 460. As the court of appeals observed, this Court has held it not to be a violation of the Sixth Amendment. *Lutwak* v. *United States*, 344 U.S. 604. See, also, *Clune* v. *United States*, 159 U.S. 590; *Delaney* v. *United States*, 263 U.S. 586.

Petitioners do not dispute this precedent, but they claim that the co-conspirator hearsay exception is "in conflict with the rationales" of *Bruton* v. *United States*, 391 U.S. 123, and *Evans* v. *Dutton*, 400 F. 2d 826 (C.A. 5) (Pet. No. 1047, 15). But *Bruton* expressly did not involve the co-conspirator exception to the hearsay rule, 391 U.S. 123, 128, n. 3, and this Court, since the instant petitions were filed, has reversed the Fifth Circuit's decision in *Dutton* v. *Evans*, 400 U.S. 74.

In *Dutton* v. *Evans*, *supra*, the Court held that Georgia's co-conspirator exception to the hearsay rule was not a violation of appellee's right of confrontation under the Sixth and Fourteenth Amendments. While the validity of the federal evidentiary rule was not in issue, 400 U.S. at 82, the federal rule is considerably more restrictive of co-conspirator hearsay than the Georgia rule whose application to Evans was held constitutional.

Moreover, looking to the impact of the co-conspirator hearsay admitted in this case, one is struck by its insignificance. The court of appeals, after a thorough

examination,[14] concluded that the instances in which declarations of a co-conspirator who did not testify were received "amounted at best to a handful * * *. The sum of its weight was extremely small and insignificant when the record is considered as a whole" (Pet. App. 38a). Any confrontation issue in this case is raised in a context of harmless error beyond a doubt. See *Dutton* v. *Evans, supra; Harrington* v. *California, supra; Lutwak, supra.*

B. There is no merit to the contention (Pet. No. 1047, 16–17) that the decision of the court below conflicts with decisions of the Sixth and Ninth Circuits. In both *Townsend* v. *Henderson,* 405 F. 2d 324 (C.A. 6) and *O'Neil* v. *Nelson,* 422 F. 2d 319 (C.A. 9), certiorari granted, No. 336, O.T. 1970, November 9, 1970, confessions of one co-defendant, made while in police custody[15] and incriminating to another co-defendant, were received in violation of the rule of *Bruton* v. *United States,* 391 U.S. 123. The question before the courts of appeal in each of those cases was whether

[14] Petitioners' contention that the court of appeals rejected their confrontation claims "[w]ithout particularized analysis of the evidence in question" (Pet. No. 1047, 15) is inaccurate. As the court's opinion makes clear (see, *e.g.*, Pet. App. 37a, 38a), the court examined the record with care in considering the confrontation issue and with little assistance from petitioners, who "have made little attempt to document their claim by specific page references to the record" (Pet. App. 37a, n. 15). Petitioner's contention (Pet. No. 1047, 16, n. 1) that co-conspirator hearsay was the only evidence of Quinn's agreement to fix china prices prior to American's January 1963 increase is inaccurate. See Pet. App. 17a–21a.

[15] The disputed declaration in *Townsend* was made to a prison official while the declarant was kept in solitary confinement, and was held to be an involuntary confession. *Id.* at 327–328.

the constitutional error in the prosecution's admitted violation of *Bruton* was cured by the opportunity which each appellant had at trial to cross-examine the co-defendant. Since in each instance the co-defendant denied ever making the confession, the courts of appeal held that cross-examination was not useful and the *Bruton* error loomed too large to be harmless. *Townsend* v. *Henderson*, 405 F. 2d at 328–329; *O'Neil* v. *Nelson*, 422 F. 2d at 321–322.

By contrast, the testimony to which the petitioners now object was fully admissible against all the defendants under well-developed rules of evidence and decisions of this Court. Bonnett on direct related his conversation with Quinn in a Waldorf-Astoria hotel room; Quinn told him that he and the other conspirators had agreed to limit discounts (JA 302a–303a). This declaration was admissible against Quinn as an admission by a party, see Wigmore on *Evidence* (3d Edition), § 1048, and against his co-conspirators under traditional principles approved by this Court. *Supra*, p. 15.[16]

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[16] Petitioners' observation (Pet. No. 1047, 16) that Quinn denied this conversation with Bonnett is in essence a complaint that the jury chose to believe Bonnett, not Quinn. Petitioners' contention (Pet. No. 1047, 16, n. 2) that "prosecution witnesses were allowed to give opinion evidence without being able to recall the facts upon which their opinions were based" is without merit. Of the four witnesses to whose testimony petitioners refer, two (Quinn and Held) were *defense* witnesses; the other two, Callanan and Pierson, dealt in specifics and were subject to vigorous cross-examination. See, for example, JA 215a–224a; 228a–229a.

C. Petitioners' contention that the admission of the HCA (or Pape) notes denied their Sixth Amendment right to confrontation (Pet. No. 1047, 10–14) is unfounded. These notes, (E168–178) written by Raymond Pape on stationery of the Hotel Corporation of America ("HCA"), were found stapled together in the files of Crane Co., Pape's employer and a defendant (Pet. App. 31a). The HCA notes "echoed figures and statements" which Quinn had written on an internal American Standard worksheet dated March 1, 1963 (Pet. App. 37a; E146). These two documents were part of the government's proof that the conspirators had met on March 28, 1963, at the Palm Beach Biltmore (an HCA hotel) and had agreed on the basis of American Standard's projections, to eliminate regular enamel and fix prices on acid resistant enamel (Pet. App. 30a). Pape, the author of the notes, was seriously ill with heart disease at the time of the trial—indeed he died of heart failure shortly after the trial—and accordingly, although he was technically available to testify, the government promised not to call him if it could possibly avoid doing so (Pet. App. 31a, n. 11). The United States did not call Pape as a witness but introduced his notes instead.

The main argument [11] petitioners now advance is that the confrontation clause requires the government

[11] Petitioners also contend that in upholding the admission of the notes the court of appeals "* * * erroneously equated the right to confrontation with the hearsay rule contrary to this Court's express rejection of such an equation in *California* v. *Green*, 399 U.S. 149 (1970)" (Pet. No. 1047, 14). The

to produce a witness to testify to any fact, so long as it is incriminating and so long as the witness is literally available (Pet. No. 1047, 14). Such a position, which would exclude on constitutional grounds virtually all extra-judicial declarations of an available witness, was not accepted by this Court in *California* v. *Green*, 399 U.S. 149,[18] and is inconsistent with the recent decision in *Dutton* v. *Evans*, 400 U.S. 74. In *Dutton*, declarant was available to testify, though he probably would have claimed the privilege against self-incrimination. The prosecution did not call him to the stand and used instead a hearsay declaration; this Court found no violation of the defendant's right to confrontation. Here the government introduced Pape's written notes without calling him as a witness to avoid dangerous strain upon a man in demonstrably precarious health.[19]

Finally, we note, the Pape notes related only to the fourth aspect of the conspiracy. Even if one assumes

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court of appeals did not make such an equation. The court did hold that the notes were not hearsay (Pet. App. 38a–39a), but only in response to petitioners' arguments below that they were (Pet. App. 37a–38a). The rejection of this argument, made briefly again in this Court (Pet. No. 1047, 12), was correct. See, *e.g.*, McCormick, *Evidence* (1954), 463–466.

[18] Mr. Justice Harlan advanced a related, but less sweeping position, bottomed on due process grounds, in *California* v. *Green*, *supra*, at 186–187 (concurring). He has now rejected this prior view. *Dutton* v. *Evans*, 400 U.S. 74, 93 (concurring).

[19] Petitioners, of course, could have called Pape had they thought his testimony would be useful to them. He was, after all, an executive of a co-defendant corporation. Presumably they feared the impact of his testimony, or else they recognized what the government earlier recognized: that a man this sick should be spared the ordeal of testifying if it could possibly be done.

they pertained to some other time or place than the Palm Beach meeting, proof of the other three aspects of the conspiracy remains unimpaired. The notes would nonetheless remain cogent and proper proof of American Standard's participation in this aspect of the conspiracy. And the remaining proof *e.g.*, pp. 9–12, *supra*, would be more than adequate to establish the complicity, as well, of the other defendants.

D. The essentially related claim that the prosecutor violated his duty under *Brady* v. *Maryland*, 373 U.S. 83, by failing to produce the transcript of Pape's grand jury testimony before trial (Pet. 1047, 19–20; Pet. 1048, 7–11; Pet. 1049, 13–18) is unsound. Although petitioners filed a blanket, pretrial motion for production of "all material helpful or exculpatory" to them (J.A. 25a), the motion was withdrawn upon the prosecutor's assertion that he was aware of no such material in his possession. Never during trial did petitioners indicate specific interest in the Pape transcript. Never was the trial judge asked to review the prosecutor's judgment that this or any other document was not subject to production under *Brady*.

In their opening brief on appeal, petitioners asserted for the first time that introduction of Pape's notes without putting Pape on the stand suggested that Pape's grand jury testimony had been suppressed to conceal inconsistencies between it and the government's theory of authorship and significance of the notes. The government is satisfied that the transcript was not producible under *Brady;* we be-

lieve, moreover, that appellants gave up their right to make the claim on appeal by not affording the trial judge an opportunity to pass on their contentions in the first instance. Nevertheless, we voluntarily produced the transcript to appellants and to the court of appeals, in order to help rebut sweeping allegations of prosecutor misconduct.

Petitioners briefed and argued below their claim, renewed here, that isolated passages of the transcript contained arguably exculpatory material. The court of appeals, after consideration of the entire transcript, fully vindicated the prosecutor's judgment. It had little trouble concluding that Pape's testimony was "extremely incriminating" and contained no "material exculpatory evidence" (Pet. App. 54a). Under these circumstances it cannot be said that the prosecutor and the court below misconceived the prosecutor's responsibility under *Brady* v. *Maryland*.

III. THE DECISION BELOW CREATES NO CONFLICT AMONG THE CIRCUITS REQUIRING RESOLUTION NOW BY THIS COURT

Petitioner American Standard contends (Pet. No. 1047, 20–22) that the decision below "reflects" a conflict among the circuits concerning the proper interpretation of 28 U.S.C. 1732(a) and the weight to be given by a jury to a defendant's statements at trial and at the time he committed the crime. These contentions are erroneous.

A. American Standard offered as evidence internal company correspondence and memoranda containing

information from its field offices regarding the prices supposedly charged by its competitors (Pet. App. 42a). The trial court, however, rejected the company's claim that these were "business records" within the meaning of 28 U.S.C. 1732, and it excluded them as hearsay (Pet. App. 43a). The court of appeals sustained this ruling, holding that the reports were primarily based on information from "sources whose trustworthiness could not be ascertained from the documents themselves" and that American Standard was often not a party to the transactions that the exhibits concerned (Pet. App. 43a).[20]

In so holding, the court relied on *Standard Oil Company of California* v. *Moore*, 251 F. 2d 188 (C.A. 9), certiorari denied, 356 U.S. 975. The court said that it was "not inclined to adopt the contrary reasoning of the Sixth Circuit in *Continental Baking Co.* v. *United States*, 281 F. 2d 137, 148 (6th Cir. 1960)" (Pet. App. 43a). A careful reading of *Continental Baking*, however, reveals that the Sixth Circuit did not dispute or reject *Moore*. Rather, it distinguished that case as having been "predicated" on the lack of showing of a regular procedure for transmittal of the disputed reports about competitors; in the

[20] The court's judgment that these particular documents were untrustworthy was well grounded in fact. These "business records" were punctuated with rumors and unsubstantiated reports from undisclosed sources. See, for example, the gossipy nature of AS 61, 66, or 88 (American Standard Exhibits). Furthermore, American's own district manager, O'Connell, admitted that he received reports which contained incorrect information (T. 6066) and that he forwarded reports of competitors' activities whether or not he knew them to be true (T. 6023).

case before it, Continental "had an established policy" providing for just such transmittal. *Continental Baking Company* v. *United States*, 281 F. 2d 137, 148 (C.A. 6).[21] In so distinguishing *Moore*, the Sixth Circuit may well have interpreted it erroneously; indeed we believe the decision below reflects a sounder reading of *Moore*. But there is no dispute among the circuits concerning the central premise of *Moore*—that documents can be admissible as business records under 28 U.S.C. 1732 only if there is a basis for reasonable assurance that the information they contain is trustworthy and reliable. Thus no substantial disagreement is presented which requires resolution by this Court.

B. The court of appeals approved a jury instruction on the weight to be given to testimony of witnesses who were defendants or officials of defendant corporations and who denied entering into the illegal agreements; the court in *United States* v. *Chas. Pfizer & Co.*, 426 F. 2d 32, 40 (C.A. 2), disapproved a similar instruction.[22] We believe that the Third Circuit was

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[21] Petitioners' citation to *Hanley* v. *United States*, 416 F.2d 1160 (C.A. 5), certiorari denied, 397 U.S. 910, does not advance its argument (Pet. No. 1047, 21, n. 1). *Hanley* was based squarely on *Continental Baking* and its treatment of *Moore*. *Id.*, at 1168. The petition for a writ of certiorari denied in *Hanley*, No. 888, O.T. 1969, was based almost exclusively on the asserted conflict.

[22] The government has filed a petition for a writ of certiorari in *Pfizer*.

correct in this case. The instruction[23] was premised on the well-settled proposition that what constitutes an illegal "agreement" under the Sherman Act is a mixed question of law and fact. See, *e.g.*, *United States* v. *Gypsum Co.*, 333 U.S. 364, 396.

But this is not the case for resolution of any conflict there may be between the circuits. The court below correctly noted that petitioners failed to object to this instruction as given (Pet. App. 51a), and thus failed to preserve the issue for appeal. Fed. R. Crim. P. 30.

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[23] The trial court's full instruction on this point was as follows:

> You must, obviously, give due and deliberate thought to this testimony, and ultimately give to it such weight as it merits in your impartial judgment. In performing this task, you will have in mind the definition of a combination and conspiracy as it has been given to you in these instructions, recalling among other things, that the final answer to the central question in this case must be based upon the actual conduct of the defendants during the period covered by the indictment, and that the things the defendants did and said at the time, may in such a case be weightier than the things they say thereafter. You will take into consideration, also, that if all the elements are shown to establish a conspiracy, it would make no difference that the alleged conspirators did not believe that they were violating the law or intend to commit such a violation.
>
> This is by no means to suggest to you that you overlook or reject the sworn testimony of the corporate defendants' officers. That is for your judgment, not mine. The point being made here is that assertions of innocence by such officers may reflect partly legal as well as factual contentions and must be weighed along with all the evidence of every kind that has been submitted to you [J.A. 1954a–1955a].

IV. THE PROSECUTOR'S QUESTIONS CONCERNING THE KOHLER STRIKE DID NOT DEPRIVE THE PETITIONERS OF THEIR RIGHT TO A FAIR TRIAL

The prosecutor opened his cross-examination of petitioner Held with some questions based upon the officially-reported findings of the National Labor Relations Board, concerning the 1954 strike at Kohler Co. Held, a Kohler vice-president and director, on direct examination had not mentioned the strike, while tracing the history of the company and emphasizing its beneficence to its workers (Pet. App. 27a).[24] The court of appeals majority held that Kohler and Held had "invited some such inquiry" (Pet. App. 27a) and that Kohler's counsel had "opened the door further" by urging that another defendant's threshold objection to the cross-examination be overruled (Pet. App. 26a, 27a).[25] The court nevertheless concluded that the trial judge should have terminated the line of inquiry prior to completion because "its potential for prejudice outweighed its evidentiary value" (Pet. App. 27a). But considering the minimal impact of a brief interlude in the lengthy trial, weighed against the strength of the government's case, the majority found that the incident did not deny petitioners a fair trial (*Ibid.*).

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[24] Kohler's counsel had foreshadowed this approach in his opening statement when he emphasized Kohler's sense of responsibility as the principal employer in the county and its devotion to full employment, even at the cost of selling at a loss (JA 1603a–1604a).

[25] Indeed, the prosecutor first sought to avoid injection of these considerations into the case by unsuccessfully objecting to the entire line of examination on direct as immaterial (Pet. App. 24a; JA 1734a).

Accepting the view of the court of appeals that the cross-examination was excessive, it was on sound ground in concluding that in the circumstances the error could not have had sufficient prejudicial effect to warrant reversal. The entire episode took at most an hour of a trial that lasted sixteen weeks (Pet. App. 27a). Equally important, this bit of cross-examination took place several weeks prior to the conclusion of the trial, and, in keeping with Kohler's request, the matter was not even adverted to in the summations or the jury charge (Pet. App. 27a). The dissenting judge conceded that "what is posed is a close question" (Pet. App. 67a). The court of appeals carefully examined the place of this brief episode in the context of the entire trial and the strength of the evidence of petitioners' guilt, and concluded that the error was harmless.[25]

V. OTHER ISSUES RAISED BY THE PETITIONS DO NOT WARRANT REVIEW BY THIS COURT

Kohler challenges the jury instruction on criminal responsibility of a corporation for the acts of its agents (Pet. 1050, 3). The instruction, quoted at Pet. App. 59a–60a, was an accurate restatement of the law governing acts of agents within the scope of their

[25] The claim of petitioner Borg-Warner that it, too, was prejudiced by this episode is groundless (Pet. No. 1048, 11–12). Of course, this cross-examination never mentioned Borg-Warner, nor hinted at any involvement by it in the Kohler strike. Moreover, the trial judge clearly and carefully instructed the jury that this part of the cross-examination did not involve any defendants except Held and Kohler (JA 1749a–1750a, 1766a).

authority and the course of their employment, as the court below held (Pet. App. 58a–61a). Kohler's main claim throughout these proceedings has been that its sales manager, Held, was acting beyond his authority in making price-fixing agreements with competitors, because Kohler has a firm policy against such practice (Pet. 5–6). But it is the corporation which benefits directly from such illegal activities, and for this reason it is well settled that a corporation may not insulate itself from antitrust liability merely because its agent's activities may be contrary to corporate regulations. *Standard Oil Company of Texas* v. *United States*, 307 F. 2d 120, 127 (C.A. 5); *United States* v. *Armour & Co.*, 168 F. 2d 342, 343 (C.A. 3). A contrary rule, by affording an easy means for evasion of responsibility, would seriously weaken the deterrent effect of the antitrust laws. See *United States* v. *Uniroyal, Inc.*, 300 F. Supp. 84, 95 (S.D.N.Y.).

Kohler also complains that it was denied a fair trial by the exclusion of certain documentary economic evidence (Pet. 1050, 6–8). One exhibit purported to show pricing data outside the indictment period; Kohler's own economic expert, Dr. Beckman, conceded that studies which *were* admitted formed a sufficient basis for the conclusions to which he testified (J.A. 1527a). Another excluded exhibit purported to show some 650 discounts in excess of the agreed-upon limits; this exhibit was not only misleading (Pet. App. 44a) but also cumulative in light of substantial testimony that such discounts had been granted. (*Ibid.*; J.A. 1444a, 1454a.) Indeed, the trial judge offered Kohler an opportunity to introduce the invoices which sup-

posedly supported the exhibit (J.A. 1485a), but petitioner apparently did not think the matter of sufficient importance to do so.

Borg-Warner's contention (Pet. No. 1048, 22–25) that the court of appeals erroneously affirmed the trial court's "missing witness" charge is based on an error of fact. Contrary to petitioner's statement that "Borg-Warner had put in no case" (Pet. No. 1048, 23), Borg-Warner put in a case of its own, by introducing several exhibits (see, *e.g.*, E316) and taking a witness as its own on cross-examination in order to go beyond the scope of direct examination (JA 739). On such a record, the missing witness instruction was entirely proper. *Graves* v. *United States*, 150 U.S. 118.

Similarly without merit are Borg-Warner's accusations of improper conduct by the trial judge and the prosecutor (Pet. No. 1048, 13–14). The court of appeals examined the record with meticulous care and concluded that Judge Rosenberg had behaved with fairness through a long and wearing trial (Pet. App. 22a–23a). As to the prosecutor's closing remarks, the court held that any prejudice was insignificant in light of the trial court's corrective instructions (Pet. App. 29a–30a).

These and other arguments made in the various petitions were raised and exhaustively considered in the court below. To the extent that we have not discussed any argument, the careful and comprehensive opinion of the court of appeals affords an adequate answer.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

RICHARD W. MCLAREN,
Assistant Attorney General.

GREGORY B. HOVENDON,
JOHN C. FRICANO,
ROBERT B. NICHOLSON,
Attorneys.

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